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IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

JOSE RAFAEL ABELLO-SILVA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Petitioner was denied the Constitutional right to pursue a petition for a writ of habeas corpus when the court decided to treat a habeas corpus § 2255 petition filed on the basis of newly discovered evidence as a "second or successive" petition, when the prior petition, filed on different grounds pursuant to a different statute, was dismissed for lack of jurisdiction. Therefore, the petition at issue in this case was the first, and only, that the District Court had jurisdiction to consider.

2. Given the consequences of filing a § 2255 habeas corpus petition by a *pro se* inmate, should a District Court advise a petitioner of the decision to treat a *pro se* motion as having been filed pursuant to 28 U.S.C. § 2255, as well as the consequences thereof, in order that he can make an intelligent decision as to how to proceed, particularly when the *pro se* petition was specifically intended *not* to be a § 2255 petition, and was labeled as such? In this case, the District Court chose to treat the *pro se* petition as a § 2255 petition, in spite of the stated authority of the motion as being pursuant to Rule 12(b)(2) and (f) of the Federal Rules of Civil Procedure, thus making a second petition filed by counsel later that year a "second or successive" petition subjecting it to dismissal.

3. Has the Petitioner's right to pursue a Writ of Habeas Corpus been denied, under the facts of this case, when he never had the opportunity to raise newly discovered evidence that the Government had presented perjured testimony, withheld exculpatory material and convicted a person who was actually innocent?

The only alleged "prior petition" that the District Court claimed to count as Petitioner's single shot at relief was dismissed for lack of jurisdiction. The petition at issue in this case contains allegations relating to newly discovered evidence, establishing jurisdiction. A prior motion that the court lacked jurisdiction to address should not be counted a prior petition for the purpose of considering whether a second application is a "second or successive" petition subjecting it to dismissal pursuant to the AEDPA.

PARTIES TO THE PROCEEDING

The Office of the United States Attorney for the Northern District of Oklahoma represented Respondent in all trial court and appeal proceedings.

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1. This petition should be granted because the decision of the Northern District of Oklahoma and the Tenth Circuit Court of Appeals conflicts with this Court's prior rulings on the issue of an inmate's right to file a petition for a writ of habeas corpus.

2. The petition should be granted as the Tenth Circuit Court of Appeals has decided an important constitutional question which has not, but should be, decided by this Court, due to the fact that different circuit courts are issuing conflicting rulings on the question.

3. This petition should be granted because the decision of the Tenth Circuit, under the facts of this case, served to deny Petitioner his Constitutional Right to habeas corpus review.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jose Abello-Silva, respectfully requests that a Writ of Certiorari be issued to review the ruling of the Tenth Circuit Court of Appeals affirming a judgment from the Northern District of Oklahoma treating a prior pleading filed as a § 2255 petition and thus transferring the §2255 petition at issue as a "second or successive" to the Tenth Circuit, where Mr. Abello-Silva's petition was dismissed.

OPINIONS BELOW

Petitioner Jose Abello-Silva was originally convicted in 87-CR-140-B of conspiracy to import schedule I and II controlled substances and conspiracy to possess with intent to distribute marijuana and cocaine. The trial against Abello commenced on March 29, 1990, and continued until May 16, 1990, when the jury returned a verdict of guilty on both counts of the second superseding indictment. Abello was sentenced to serve thirty years in the Bureau of Prisons, and received a $2,500,000 fine on each of the two counts on May 29, 1990.

Jose Rafael Abello-Silva appealed his convictions to the Tenth Circuit, and on November 6, 1991, the court affirmed his convictions and sentence. *See U.S. v. Abello-Silva*, 948 F.2d 1168 (10th Cir. 1991). Abello sought relief before the United States Supreme Court. This Court denied Petitioner's request for Certiorari review. *United States v. Jose Rafael Abello-Silva*, 948 F.2d 1168 (10th Cir. 1991), 506 U.S. 835 (1992)

Abello then moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, alleging newly discovered evidence. The Northern District denied all of Abello's requested relief, including his request for a new trial. The Tenth Circuit affirmed

in an unpublished decision on February 20, 1997. *See United States v. Abello-Silva*, 107 F.3d 22, 1997 WL 72979 (10th Cir. 1997)

After the release of a number of previously classified documents in late 1998, Abello retained private counsel to file a § 2255 action. However, prior to the filing of the action, a "jailhouse lawyer" filed an action on Petitioner's behalf with the Northern District of Oklahoma – a "Motion to Dismiss All Counts of Charged Indictment Due to United States Lack of Territorial Jurisdiction." While it was Petitioner's understanding that this would be treated differently than the § 2255 action that he had retained counsel to pursue, the Northern District disagreed and treated the motion as a § 2255 petition, denying relief. The Tenth Circuit affirmed. See *United States v. Abello-Silva*, 1999 WL 1268343 (10th Cir. 1999)

Not knowing any of Mr. Silva's "pro se" activity, counsel filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 on November 5, 1999. The Northern District transferred the petition to the Tenth Circuit as a "second or successive" petition. The Tenth Circuit dismissed the petition on February 2, 2000.

STATEMENT OF JURISDICTION

The Opinion by the Tenth Circuit Court of Appeals was decided on February 2, 2000. A timely petition for rehearing was filed, which was denied on May 4, 2000. An additional thirty days was requested to file this petition, which was granted, until September 5, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rules 10(a) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATUTORY PROVISIONS

Rule 12(b)(2) and (f) of the Federal Rules of Civil Procedure:

12(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(2) Lack of jurisdiction over the person,

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

28 U.S.C. § 2244:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(3)(E) The grant or denial of an authorization by a court of appeals to file a second or successive shall not

be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2255:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

CONSTITUTIONAL PROVISIONS

Article I, Section 8 of the United States Constitution states, in relevant part that:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Fifth Amendment to the United States Constitution states, in relevant part:

No person ...shall be deprived of life, liberty, or property, without due process of law...

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

> have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Background.

Although Petitioner Jose Rafael Abello-Silva had never been to Oklahoma, he was indicted on drug conspiracy charges with three others on October 7, 1987. Out of thirty-one "overt acts" listed in the indictment, Abello-Silva was named in only one. Two years later, he was arrested by United States agents in a Bogota, Columbia, restaurant and flown to Tulsa, Oklahoma, in the Northern District of Oklahoma. He arrived on October 29, 1989.

Petitioner's trial began on March 29, 1990, and continued through May 16, 1990. The jury found him guilty as charged, and the Honorable Thomas Brett sentenced Mr. Silva to the maximum term authorized by treaty, thirty years in the Bureau of Prisons.

The trial was not unique among federal drug prosecutions in that Abello-Silva was never actually caught with any of the controlled substances that he was to have conspired to distribute. What was more unusual was that the offense was prosecuted in the Northern District of Oklahoma, where Mr. Silva had never been, on the basis of a phone call from a Government informant who was attempting to set up a drug deal with Abello-Silva. The call was not recorded, and the deal was never set up.

Later that year, in December of 1990, the American Bar Association Journal published an article which was extremely critical of the prosecution of Jose Rafael Abello-Silva, as well as the trial judge. Petitioner's case was still on direct appeal to the Tenth Circuit.

While Judge Brett, the trial judge, restrained himself until October 6, 1992, once this Court declined to accept certiorari after direct appeal he could wait no longer. He wrote letters to the American Bar Association and even Chief Judge Monroe McKay of the Tenth Circuit Court of Appeals in an effort to defend himself from the article's criticisms. The problem was that Judge Brett was to preside over a then-pending motion for a new trial, which was ultimately appealed to the Tenth Circuit. He eventually recused himself at the insistence of defense counsel, and the Honorable H. Dale Cook of the Northern District picked up the case.

Judge Brett remains upset and defense over the Abello trial to this day. In 1996, he spoke before a Tenth Circuit Judicial Conference, complaining about the trial and offering information that he had acquired outside the courtroom in an effort to convince those present that, contrary to the allegations of the ABA Journal article, Abello-Silva really was guilty. He did this at a judicial conference attended by members or representatives of the very court that was, at the time, reviewing the Northern District's denial of his motion for a new trial.

Late in 1998, Abello-Silva discovered a previously classified C.I.A. report that shed light on witnesses who testified for the Government, establishing that the witnesses lied and that the Government withheld valuable impeachment evidence. A petition for a writ of habeas corpus was filed on November 5, 1999, within a year of the discovery of the

new evidence. The petition was dismissed as a "second or successive" petition, in spite of the fact that the newly discovered evidence was raised in a timely fashion, and had not been raised before. The decision was affirmed on appeal to the Tenth Circuit.

B. Proceedings Below.

This case comes before this Court after a petition for rehearing was denied by a three judge panel in the Tenth Circuit Court of Appeals. While 28 U.S.C. 2244(b)(3)(E) states that the "denial of an authorization to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari," the Tenth Circuit at least addressed Petitioner's appeal and his petition for rehearing on the basis that he was not only appealing the dismissal of his "second or successive" petition, but he was also complaining that the petition for a writ of habeas corpus at issue in this case should not have been transferred to the Tenth Circuit at all. Thus, the court distinguished the issue of whether a second or successive petition should be addressed from the issue of whether there were, in fact multiple § 2255 petitions in the first place. In the order denying rehearing, the Tenth Circuit held that "[a] petition for rehearing may be filed, however, in the appeal from the transfer order itself." The Tenth Circuit did not address the fact that 28 U.S.C. § 2244 appears to apply exclusively to §2254 actions. No comparable section is present in 28 U.S.C. § 2255, although a number of other paragraphs *are* repeated. Therefore, the question remains as to whether § 2244(b)(3)(E) applies to this case at all.

Even if it does, Petitioner, through counsel, objected to the transfer order when the Northern District of Oklahoma notified the undersigned attorney, for the first time, in the transfer order, that a "jail house" lawyer had filed a "pro se" motion on

Petitioner's behalf for relief pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure in January of 1999. This was filed two months after Petitioner had retained, and *paid*, the undersigned counsel to file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255, but ten months before counsel filed a petition for a writ of habeas corpus on Petitioner's behalf. It was clearly not the intent of Jose Rafael Abello-Silva to file a *pro se* habeas corpus petition when he had paid money to counsel to do the same thing.

Nonetheless, the Northern District unilaterally made the decision to treat the motion filed by Abello-Silva as a § 2255 petition, despite the fact that the language of the motion indicated a desire for the motion not to be so treated.

The order of transfer was on November 16, 1999. Petitioner filed a timely motion to reconsider the court's decision, which was denied on December 2, 1999. This decision was appealed to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the trial court in all respects on February 2, 2000, leaving Petitioner without a petition for a writ of habeas corpus, and no chance to have one heard in the Northern District.

REASONS FOR GRANTING WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE NORTHERN DISTRICT OF OKLAHOMA AND THE TENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE ISSUE OF AN INMATE'S RIGHT TO FILE A PETITION FOR A WRIT OF HABEAS CORPUS.

The Tenth Circuit Court of Appeals has indicated a contrary position to that taken by this Court. The Tenth Circuit affirmed the trial court's decision to treat a habeas corpus § 2255 petition filed on the basis of newly discovered evidence as a "second or successive" petition, when the prior petition, filed on different grounds pursuant to a different statute, was dismissed for lack of jurisdiction.

In *Stewart v. Martinez*, 523 U.S. 637 (1998), an inmate filed a habeas claim alleging that he was not competent to be executed. It was, however, the second petition for habeas relief that he had filed, and pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, hereafter AEDPA, the district court ruled that it lacked jurisdiction to consider the claim. After moving for permission to file a successive petition, the Ninth Circuit transferred the claim back to the district court for consideration on the merits. The State sought certiorari before the United States Supreme Court, advancing the proposition that once an individual has one fully litigated habeas petition, any new petition *must* be treated as successive. (While the competency claim, raised in the first petition, had been dismissed as premature, other claims in the prior habeas petition had been granted.)

This Court granted certiorari and affirmed the Ninth Circuit's decision. The Court held that just because a motion may be the second post-conviction motion filed does not *necessarily* lead to the conclusion that the second motion is a "second or successive" § 2255 motion covered by the AEDPA. Chief Justice Rehnquist pointed out the far reaching and "seemingly perverse" implications of such a view for habeas practice. 523 U.S. at 644. For example, the Supreme Court has *never* suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state court remedies, and returned to federal court, was, by filing such action, filing a successive

petition. Likewise, under the facts of *Stewart*, a second habeas motion that restricts the argument to a prisoner's competency to be executed is not a second or successive motion. *"To rule otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review."* 523 U.S. at 645.

In this case, the three-judge panel's decision is logically inconsistent with the Northern District's position that it lacked jurisdiction to hear Abello-Silva's prior *pro se* motion filed January 26, 1999. On March 17, 1999, Judge Cook of the Northern District of Oklahoma ruled, in no uncertain terms, that the AEDPA prevented him from addressing the issues raised in Abello-Silva's motion pursuant to Rule 12(b)(2) and (f) of the Federal Rules of Civil Procedure. The fact that he felt the need to advise Mr. Silva of the fact that he would have denied his claim anyway doesn't change the substance of his ruling.[1] If the Northern District lacked jurisdiction to hear the *pro se* "12(b)(2)" motion filed earlier in the year, the November motion was not a "second or successive" § 2255 petition. Since the November motion alleges the discovery of new evidence, unlike the previous *pro se* motion, the Northern District clearly had jurisdiction to address the instant motion pursuant to 28 U.S.C. § 2255.

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[1] The recently decided unpublished appellate decision of the Tenth Circuit states that while Judge Cook "found the §2255 motion time-barred under the AEDPA, [he] also denied the motion on the merits, explaining that Defendant 'was convicted of offenses which fall squarely under federal jurisdiction.'" This is not correct. If the motion was time-barred, the trial court lacked jurisdiction to rule on the merits. Either the court had jurisdiction to rule on the motion or it did not. The court ruled that it did not. Anything else that the court had to say about the merits of the case is just surplus verbiage. *United States v. Abello-Silva*, 1999 WL 1268343 (10th Cir. Okla.)

II

THE PETITION SHOULD BE GRANTED AS THE TENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT, BUT SHOULD BE, DECIDED BY THIS COURT, DUE TO THE FACT THAT DIFFERENT CIRCUIT COURTS ARE ISSUING CONFLICTING RULINGS ON THE QUESTION.

Given the consequences of filing a § 2255 habeas corpus petition by a pro se inmate, a District Court should advise a petitioner of the decision to treat a pro se motion as having been filed pursuant to 28 U.S.C. § 2255, as well as the consequences thereof, in order that he can make an intelligent decision as to how to proceed, particularly when the pro se petition was specifically intended not to be a § 2255 petition, and was labeled as such. In this case, the District Court chose to treat the pro se petition as a § 2255 petition, thus making a second petition filed by counsel later that year a "second or successive" petition subjecting it to dismissal.

In this case, the problem lies in the unilateral decision of Judge Cook, the district court judge, to treat the January *pro se* petition filed by Jose Abello-Silva as one filed under § 2255 when it was Mr. Abello-Silva's express articulated wish that it *not* be treated as a § 2255 petition. While the time-honored practice of construing *pro se* litigants' pleadings liberally has historically been of benefit to a prisoner petitioning a court for relief, the AEDPA changed the playing field dramatically in 1996.

> With the AEDPA in place, the practice of liberally construing post-conviction motions as § 2255 petitions can, in the absence of cautionary or educational measures, impair the ability of inmates to

> challenge their convictions on collateral review. If each *pro se* post conviction filing is treated as a § 2255 writ, as was once the case, inept petitioners face losing potentially valid constitutional claims at the hands of judges who are applying a rule of liberal construction that was created to benefit *pro se* claimants. *United States v. Miller,* 197 F.3d 644, 649 (3rd Cir. 1999)

The undersigned attorney was able to find three federal circuits that have, at least in part, addressed the problems created by the unilateral labeling of a prisoner's request for relief as a §2255 motion. Two of the circuits, the second and the third, now apply the following "prophylactic" procedure when a *pro se* petitioner files a post-conviction proceeding in federal court:

> ...[W]e prescribe that upon receipt of a *pro se* pleading challenging an inmate's conviction or incarceration – whether styled as a § 2255 motion or not – district courts should issue a form notice to the petitioner regarding the effect of such a pleading in light of AEDPA. This communication should advise the petitioner that he can (1) have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a § 2255 motion and be heard as such, but lose his ability to file a second or successive petition absent certification by the court of appeals; or (3) withdraw the motion and file one all-inclusive petition within the one-year statutory period prescribed by AEDPA in § 2255. *Miller* at 646.

The facts of *Adams v. United States*, 155 F.3d 582 (2nd Cir. 1998), on which the *Miller* decision relied, were startling similar to the facts before the Tenth Circuit. After the Second Circuit affirmed petitioner's conviction on direct appeal, the petitioner in *Adams* filed, just as did Abello, a *pro se* application invoking Federal Rule of Criminal Procedure 12(b)(2) entitled "Motion to Dismiss All Counts of Charged Indictment Due to United States Lack of Territorial Jurisdiction."[2]

The United States District Court for the Eastern District of New York did exactly what Judge Cook of the Northern District of Oklahoma did – he unilaterally treated the motion as a § 2255 petition and dismissed it on March 11, 1997. (Although lack of jurisdiction did not appear to be the basis for the dismissal.) Realizing his error in judgment, or perhaps only recently becoming aware of the AEDPA, the petitioner attempted to withdraw his motion on March 28, 1997. The district court declined petitioner's request, in spite of his specific explanation that he was concerned that his ability to file a §2255 motion would now be impaired.

Rather than avoid the issue, the Second Circuit treated the question as one of "informed consent." *Adams* 155 F.3d at 584. The right to seek habeas relief is guaranteed by the United States Constitution. When the petitioner in *Adams* filed his "12(b)(2)" motion, it is doubtful that he realized that he was, in effect, waiving his right to *ever* file a habeas corpus petition. Due

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[2] This is virtually exactly the motion filed by Abello through his "jail house lawyer." It would be a safe bet that, were this Court to set the two motions side by side, they would read exactly the same, word for word. The January, 1999 motion was not a *pro se* petition at all, but a scam run by another inmate with a copy of a motion that not only was worthless, but has served to prevent Petition from ever seeking habeas corpus relief in the Northern District of Oklahoma.

process requires that a person, even a prisoner filing a *pro se* pleading, be advised of his rights under the Constitution prior to waiving such an important right.

One case decided soon after the enactment of the AEDPA failed to discuss the issued raised above, but affirmed the district court's decision to treat a subsequent § 2255 motion as "second or successive" when the prior motion, presumably filed prior to the enactment of the AEDPA, was filed as a "motion to dismiss." In *In re Tolliver*, 97 F.3d 89 (5th Cir. 1996), the district court treated the prior motion as a § 2255 motion, noting that the prior request for relief by petitioner was addressed *and granted*. Unlike the case before this Court, the court in *Tolliver* clearly had jurisdiction to hear the prior motion, and the issues raised were addressed on the merits. No cases were cited by the court in support of its conclusion, however, and there was no elaboration regarding the fairness issues that concerned the Second and Third Circuits.[3]

While there is, at least, a superficial discrepancy between the way that the Second and Third Circuits treat the issue before this Court from the way that the Fifth Circuit treated the issue in 1996, it appears that the few circuits that have addressed the issue have, in accordance with United

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[3] The decision of the Third Circuit is the most recent of this trilogy of cases, filed on November 30, 1999. (Subsequent to Judge Cook's decision to treat Abello's November 5, 1999 § 2255 motion as a "second or successive one.") The Third Circuit cited the *Tolliver* decision, stating that "[t]he Fifth Circuit's opinion in *Tolliver* is so brief and without elaboration that it is hard to use it as a foil to challenge the result in *Adams*. To be fair to our sister court, *Tolliver* was decided two years before *Adams* and almost immediately after AEDPA's enactment. The Fifth Circuit did not have the benefit of *Adams*' discussion, and it does not appear that the *Adams* argument was raised. Faced directly with the argument, the *Tolliver* court might have decided otherwise..." *Miller* 197 F.3d at 651.

States Supreme Court authority, found the nature of the prior petition an important consideration in the determination as to whether the "second or successive" petition requires appellate approval. *None* use the AEDPA to take away a Petitioner's single shot at having a substantive issue in a habeas action heard by the district court. Even the petitioner in *Tolliver* had his case heard in his first "motion to dismiss."

By not defining what is meant by "second or successive," Congress has left the question as to whether the district court has jurisdiction to address a second post conviction motion for relief pursuant to 28 U.S.C. § 2255 open to some judicial interpretation. While the Tenth Circuit has not directly confronted the issues that the Second and Third District have in a published decision, the court continues to use the "abuse of the writ" standard in effect before the AEDPA was enacted. *See Reeves v. Little,* 120 F.3d 1136 (10th Cir. 1997). Since Abello-Silva has ***never*** had a §2255 habeas corpus motion determined on the merits, his filing of such an action on November 5, 1999, can hardly be said to qualify as an "abuse of the writ." None of the claims raised in the November petition had been raised before. For a habeas filing to constitute an "abuse of the writ," a petition must "(1) 'successively' repeat claims previously decided on the merits, or (2) 'abusively' assert new grounds unjustifiably omitted from a prior petition." *Watkins v. Champion,* 39 F.3d 273, 275 (10th Cir. 1994).

The idea is a simple one – even under the AEDPA, every inmate should get at least one clear chance at having his claims addressed in a habeas corpus petition. After that, the AEDPA makes a "second bite at the apple" almost impossible. Therefore, the definition of what constitutes that "first bite" should be narrowly construed. The Northern District of Oklahoma has left Jose Rafael Abello-Silva without a "bite from the apple." This Court should

accept certiorari to resolve an important constitutional question, as well as one of statutory interpretation, that has been resolved differently in different districts.

III

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE TENTH CIRCUIT, UNDER THE FACTS OF THIS CASE, SERVED TO DENY PETITONER HIS CONSTITUTIONAL RIGHT TO HABEAS CORPUS REVIEW.

The Tenth Circuit Court of Appeals has denied Petitioner his constitutional right, under the facts of this case, to pursue habeas corpus review. The Petition filed on November 5, 1999, was the only habeas corpus action filed by Petitioner that the District Court had jurisdiction to address, since it alleged newly discovered evidence. The prior post-conviction action was dismissed for lack of jurisdiction, therefore the issue that was raised therein was not actually litigated. Petitioner is entitled to have a District Court review at least one request for habeas corpus review, so long as the issue raised is not barred jurisdictionally.

Petitioner Abello brought his claim, through counsel, within one year of the date on which the facts supporting his claim were discovered through the exercise of due diligence, making it timely, even under the gatekeeping provisions of the AEDPA. Further, any procedural default on any other claims raised should have been reviewed by the Northern District due to the existence of evidence that Petitioner is "actually innocent" of the charges for which he has been convicted. Finally, since the petition at issue in this case is the only habeas corpus petition that the court had the jurisdiction to address, any prior motion that the court did *not* have the jurisdiction to address should not be used to thwart Petitioner's single shot for habeas corpus relief.

On October 8, 1998, the Central Intelligence Agency released an Inspector General's Report on the World Wide Web. The report was discovered by counsel for Abello a month later. The report contained a number of references to Government witnesses at trial that could have been used for impeachment purposes had the information not been withheld at trial.

At Abello's trial, Gary Betzner, as the lead off witness for the United States Government, testified that he worked extensively for the C.I.A. as a drug pilot. The C.I.A. work obviously lent credibility to his testimony implicating Petitioner Abello-Silva, for which there was no corroboration. The C.I.A. report cites numerous government supporting its conclusion that one, there was *never* a C.I.A. drug pilot connection, two, that the landings in Costa Rica in which Betzner described off loading weapons and loading drugs were *physically impossible to accomplish*, and three, despite Mr. Betzner's assertions that he had an enormous drug smuggling operation with multiple aircraft and pilots trafficking night and day between Columbia and Florida, the report is virtually devoid of any mention of Betzner except notations that he had testified before Congress and given statements to the media. Fourth, the report states that, in spite of Mr. Betzner's prior assertions, there was no credible independent evidence of a guns for drugs exchange between narcotics traffickers and the Contras as described by Mr. Betzner. *This information was not made available to Petitioner at trial.*

There were two major "informant" witnesses who testified against Jose Abello-Silva at trial – Gary Betzner and Boris Olarte. Mr. Olarte, like Mr. Betzner, had a history of informing on others to gain Government favor, although he had at least one world famous target on his resumé – Panama Dictator Manuel Antonio Noriega. At some point in the Noriega

prosecution, the Government discovered that Orlarte, like Betzner, was a liar whose only interest was obtaining reductions in lengthy federal sentences. *The Government did not inform Petitioner of this fact.* The Washington Post reported on April 5, 1992, that by September 1991, the prosecutors in the Noriega trial had concluded that the Olarte story was untrustworthy due to the fact that it did not comport with the statements of other witness. On December 18, 1990, Julie DelCour of the Tulsa World noted in a letter to the ABA Journal that Boris Olarte was "...the prosecution's star witness against Abello and a potential witness in the upcoming Manuel Noriega trial..." If the Government had made a decision not to use Orlate at the Noriega trial at the time of trial, this information would most certainly have been appropriate *Brady* material, since the decision was based on Olarte's lack of credibility.

At an April 1, 1994, hearing before the Honorable Judge Brett on Petitioner's motion for a new trial, counsel attempted to present evidence that the Government was aware that Boris Orlarte lacked credibility at the time of Petitioner's trial. In support of Abello's then-pending motion for new trial, the examination of two critical witnesses, Assistant United States Attorney Ellen Cohen and Assistant United States Attorney David O'Meilia was unduly restricted, preventing Abello from establishing that in fact at the time of Petitioner's trial that the Government was aware that Boris Orlarte was an unreliable witness and was fabricating testimony. AUSA Cohen had previously made statements to another witness, whose testimony was excluded at trial, to the effect *that she was aware that Boris Orlarte was totally incredible and unreliable* and, as a result, had dismissed charges against him, and that this was known at the time of the Abello trial.

A great deal of the C.I.A. report references an inquiry into John Hull, a man with whom Betzner claimed to be involved in narcotics trafficking out of Costa Rica. Betzner also claimed that Hull was a C.I.A. operative, a claim flatly denied by the Government in the C.I.A. report. The information is significant, as Hull's airstrip, which was alleged to have been used for drug trafficking, *could not have been used in the manner described by Betzner at trial.* The strip was too short – only 1,600 usable feet – to be used to traffic drugs. Cessna's own information on the 402B aircraft established that had it been loaded as he alleged, the plane would have been 800 pounds overweight, making it impossible to take of from a grass strip such as Hull's. *Betzner was lying.*

The false information was emphasized in the prosecutor's closing argument when he stated that Gary Betzner "...even ended up doing things for the C.I.A. he told you about and he's now doing 27 years and two months, and he has a Rule 35 pending for his reduction of sentence." The above-described information was not available to Jose Rafael Abello Silva, however, until the release of the C.I.A. report.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court of the United States held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150 (1972). Such evidence is favorable to an accused, so that if disclosed and used effectively, it may make the difference between conviction and acquittal. This is especially true in Mr. Abello-Silva's case, given the fact that he was *never* caught with the controlled substances that he was accused of conspiring to deliver. His conviction was based entirely on the testimony of others – almost all

of whom were drug dealers serving substantial prison time.

It is not sufficient for the office of the U.S. Attorney to profess ignorance of the existence of impeachment evidence against Betzner or Olarte. An Assistant United States Attorney using a witness with an impeachable past has a constitutionally derived duty to search for and produce impeachment information requested regarding the witness. *See U.S. v. Osorio*, 929 F.2d 753 (1st Cir. 1991), *Giglio v. United States*, 405 U.S. 150 (1972) The prosecutor charged with discovery obligations cannot avoid finding out what "the government" knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge.

The Government's "rush to justice" violated Petitioner's right to a fair trial. For example, Abello wanted to contest the trial testimony of Special Agent William L. Athas and Nelson Rodriguez, who advised the jury at Abello's trial that on June 4, 1987, approximately 150 tons of marijuana was seized from a ranch owned by Petitioner. The ranch, known as Las Palmitas, was actually owned by Dagoberto Orozco. Abello's attorney at trial could not secure the appearance of Carlos Fernandez-Fernandez, a professional topographer/surveyor with fifteen years of experience in Colombia, to support Petitioner's claim that Abello did not own the ranch and the aforementioned seizure of marijuana was actually from a vacant lot that was not even on the ranch known as Las Palmitas. The trial court, in a hurry to conclude matters, denied Abello's request for a one week recess to obtain the deposition of Carlos Fernandez-Fernandez.

Perhaps even more compelling, at least when taken in conjunction with the statements of Carlos Fernandez-Fernandez, was the extra-judicial

declaration of Dagoberto Orozco Martinez himself, who admitted that *he* was the owner of the real property known as Las Palmitas. He admitted to having owned the property since 1984, and that he constructed a runway on the property in 1986. To the best of his knowledge, Jose Abello-Silva *never* used this runway, as claimed by the Government, and finally, the marijuana seized on or about June 4, 1987, belonged to Martinez and not Jose Abello-Silva.

Mr. Orozco Martinez's presence could not be secured at trial – he was a fugitive from justice at the time. He was, however, available at the time that Petitioner filed his motion for new trial, and he should have been allowed to testify at that time. He had been apprehended and was in a Colombian jail, *for the same marijuana that Jose Abello was accused of possessing.*

Less than a year after Abello-Silva's trial, while his case was still on direct appeal, the American Bar Association Journal published an article entitled "The Abello Conspiracy." The article proposed that there was a conspiracy to indict and convict Abello in the Northern District, rather than evidence of a conspiracy to distribute controlled substances in the Northern District of Oklahoma. The Honorable Thomas Brett read the article, and clearly took offense in the article's assertion that Mr. Abello-Silva had an unfair trial. He wrote the Journal requesting a retraction, but the response was only to correct a few insignificant errors in the article. Judge Brett was not happy.

On November 24, 1992, Brett wrote J. McWilliams, *Esq.*, the president of the American Bar Association to complain about the article. A copy of the letter was sent to Chief Judge Monroe McKay of the Tenth Circuit Court of Appeals

While all of this was going on a motion for new trial was pending before the trial court. In fact, an

evidentiary hearing was held on April 1, 1994, where Judge Brett denied Petitioner's motion for discovery, sustained the Government's motion to quash subpoenas and to prevent certain defense witnesses from testifying. Judge Brett finally recused himself on June 3, 1994, but only after defense counsel insisted.

On July 17-19, 1996, Judge Brett spoke before a Tenth Circuit Judicial Conference. His subject – "Seventeen Years as a Trial Judge, Only One Enigma." That enigma was, of course, Jose Abello-Silva. The problem was that he was, in all likelihood, *speaking before members of the Tenth Circuit Court of Appeals while an appeal was pending before the Tenth Circuit* on Abello's Rule 33 motion for new trial, which was not decided until February 20, 1997.

A trial judge may actively participate and give his or her own impressions of the evidence or question a witness, as an aid to the jury, so *long as he does not step across the line and become and advocate for one side. U.S. v. Filani*, 74 F.3d 378 (2nd Cir. 1996) While there is no evidence that the trial court's irritation with the proceedings at trial was something that the jury picked up on, when the American Bar Association Journal published an article in December of 1990 critiquing the Abello prosecution and trial, Judge Brett lost all objectivity. He first wrote the ABA Journal and the Tenth Circuit in an effort to defend himself and the proceedings at trial, but when the Journal conceded only that there were a few minor errors in the article, he remained unsatisfied. He utilized a forum, speaking at a Tenth Circuit Judicial Conference in July of 1996, to question how the "ABA Journal was duped into printing such a story in the first place...," that the ABA Journal was in "direct violation of Rule 8.2 of the Rules of Professional Conduct," and that "[i]t's your friends you need to watch out for, not your enemies." He cited the questionable extra-judicial admissions of

Marshall Ives, Abello's former attorney, who, according to Judge Brett, had confirmed Abello's guilt.

Petitioner also has evidence that he is innocent of the charges against him. In September of 1989, Special Agent Martin Weber of the Federal Bureau of investigation interviewed Boris Orlarte, who gave him the following description of the man with whom he had been involved in a drug conspiracy: "Between 30-35 years old, approximately six feet tall, a muscular 200 to 220 pounds, has brown or light brown hair and brown eyes." He went further to state that "Abello wears thick glasses, has freckles, and one of his *hands was severely injured in an airplane accident so that he cannot bend the fingers or close the hand into a fist.*" This information was reduced to an affidavit now in Petitioner's possession that was dated September 14, 1989. The affidavit was signed by Boris Olarte-Morales and was subscribed by the Honorable Judge Thomas Brett.

A second description has been discovered in a correspondence sent to Mr. Andre Surena, an assistant legal advisor for Extradition and Legal Assistance in the United States State Department from the Criminal Division of the Office of Internal Affairs. This letter describes the person sought at follows:

> Abello-Silva is a Colombian citizen who was born on November 30, 1954. He is described as being six feet tall, weighing 230 pounds with blond hair and brown eyes. *The index finger of his right hand is missing*, and he often wears glasses. He is sometimes called "El Mono" or "Pecozo", and has used the aliases Manuel Abello and Raul Ernando Avello. His last known address was Banco Ganadero, 7th Floor, Santa Marta, Colombia.

These descriptions are in sharp contrast to the man that was brought to Tulsa in October of 1989. Jose Rafael Abello-Silva is a man of slight build, not muscular, with very dark features. His hair is black, and his skin is dark without freckles. What should have raised the most suspicion was the fact that *both of Petitioner's hands are in perfect shape – no sign of any injury, and all ten fingers right where they are supposed to be.*

Jose Abello-Silva had a brother, now deceased, who was described at trial by Klaus Myer, a German national being held by federal authorities in Miami on drug charges at the time of trial. He testified that he remembered Abello's brother, Api, because Api had approached him at one time for a "special [drug] deal" which was never explained. He described Api: "A very big sporty guy, strong build, body – about six feet high, five-nine, six feet high, blond hair. That's Api." He added that Api weighed over 200 pounds. Finally, Api's *right index finger is missing.* It would appear that Api was a drug dealer – a fact that most certainly would have been discovered in any investigation of Petitioner, yet, once again, the Government failed to disclose this fact to defense counsel.

The conviction of a defendant who is "actually innocent" of the crime for which he was sentenced has a claim of Constitutional proportions that can be addressed on a writ for habeas corpus. See *Herrera v. Collins*, 506 U.S. 399 (1993) While finding that, under the specific facts of *Herrera*, that the Constitution did not require the vacation of his death sentence, the Supreme Court left open a door that habeas relief is available to a petitioner, in spite of a delay in raising a claim, when a "fundamental miscarriage of justice would result." The fundamental miscarriage of justice exception is available "only where the prisoner supplements his constitutional claim with a colorable

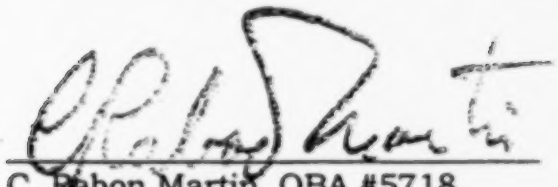
showing of factual innocence." *Kuhlman v. Wilson*, 477 U.S. 436 (1986)

A review of the record in the possession of the undersigned counsel does not reveal that the issue(s) relating to the differences between descriptions of Mr. Abello before his arrival in the country and the appearance of the man who was tried in the Northern District were adequately explored at trial. This matter should have been set for a hearing in order to establish Petitioner's claim of "actual innocence."

CONCLUSION

Petitioner Jose Rafael Abello-Silva has been denied the right, pursuant to Article I Section 8 of the United States Constitution, to present a claim of habeas corpus in the Northern District of Oklahoma. In spite of the fact that he presently newly discovered impeachment evidence that had not been disclosed by the Government at trial, he was denied the right to the Northern District's review due to a finding that the habeas petition at issue in this case was his second, a finding that was incorrect. Due to the importance of what is now likely to be an inmate's only chance at obtaining habeas corpus review, it is suggested that this Court accept certiorari in order to provide the district courts with guidelines in handling inmate *pro se* motions, since the old practice of construing what are perceived as inartfully drafted post-conviction pleadings as habeas corpus petitions can now very well serve to prejudice a petitioner, which was never the intent of the court's practice of construing the petitions broadly.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, C. Rabon Martin, do hereby certify that on the 16th day of November, 2000, a true and correct copy of the above and foregoing document was delivered to:

The Solicitor General
United States Department of Justice
Room 5614
Washington, D.C. 20543

C. Rabon Martin

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSE RAFAEL ABELLO-SILVA,	
Petitioner-Appellant,	
v.	**Nos. 99-5231**
	00-5002
	District Court
	No.,99-CV-942C
UNITED STATES OF AMERICA,	**(N.D. of Oklahoma)**
Respondent-Appellee.	

ORDER

Filed February 2, 2000

Before TACHA, BALDOCK and BRORBY, Circuit Judges.

Jose Rafael Abello-Silva seeks authorization to file a second 28 U.S.C. §2255 motion in the district court. He also appeals the district court's transfer of his motion to this court. We deny authorization and dismiss the appeal.

Mr. Abello-Silva originally filed an "Application for Writ of Habeas Corpus" in the district court. The court, determining that the motion was a second §2255 motion,

transferred the matter to this court pursuant to *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997). Mr. Abello-Silva then filed a motion in this court, a motion to remand, and a notice of appeal from the transfer order.

Mr. Abello-Silva challenges his conviction and sentence imposed in 1990 for conspiracy to import cocaine and marijuana and conspiracy to possess cocaine and marijuana with intent to distribute.

Mr. Abello-Silva argues that the gatekeeping provisions of the Antiterrorism and Effective Death Penalty Act are unconstitutional. This argument is foreclosed by the Supreme Court decision in *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (holding that the new restrictions did not constitute a suspension of the writ contrary to the Constitution).

Mr. Abello-Silva also contends that his post-judgment motion filed in January 1999 should not be construed as his first §2255 motion. However, the district court also construed the motion that way and this court affirmed. *See United States v. Abello-Silva*, 1999 WL 1268343 (10th Cir. 1999) (unpublished disposition). Accordingly, the district court did not err in transferring this matter.

In addition, Mr. Abello-Silva argues that it would be inappropriate for this court to rule on the transfer issue. He does not provide sufficient facts to support a conclusion that "a reasonable factual basis exists for questioning the judge[s'] impartiality." *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995). Speculation alone is insufficient. *Id.*

As for the grounds of relief, Mr. Abello-Silva argues that he was denied a fair trial, denied due process, denied effective assistance of counsel, that the government withheld exculpatory evidence in violation of

Brady v. Maryland, and that he can establish his actual innocence.

We have thoroughly reviewed the matter and conclude that Mr. Abello-Silva has failed to make the prima facie showing required by §2255 as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA). His contentions are not based on newly discovered evidence that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found [him] guilty of the offense" or on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §2255.

The so-called exculpatory evidence which Mr. Abello-Silva alleges was unlawfully withheld by the government is either not newly discovered or not material under *Brady*. The grounds raised also fail to meet the statutory standards.

As noted above Mr. Abello-Silva has filed an appeal from the district court's transfer order. This order is not appealable. *See Federal Deposit Insurance Corporation v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). Accordingly, this court lacks jurisdiction over the appeal.

The government's motion to file its brief and appendix under seal is granted.

Mr. Abello-Silva's motion to remand is **DENIED**, authorization to file a second §2255 motion in the district court is **DENIED**, and appeal no. 00-5002 is **DISMISSED**.

Entered for the Court
PATRICK FISHER, Clerk of the Court

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSE RAFAEL ABELLO-SILVA,	
Petitioner-Appellant,	
v.	**Nos. 99-5231** **00-5002** **District Court** **No.,99-CV-942C**
UNITED STATES OF AMERICA,	**(N.D. of Oklahoma)**
Respondent-Appellee.	

ORDER

Filed May 4, 2000

Before TACHA, BALDOCK and BRORBY, Circuit Judges.

This matter is before the court on the movant's petition for rehearing and suggestion for rehearing en banc.

An order denying authorization to file a second or successive 28 U.S.C. §2255 motion "shall not be the subject of a petition for rehearing . . ." 28 U.S.C. §2244(b)(3)(E). *See Hatch v. Oklahoma*, 92 F.3d 1012, 1017 (10th Cir. 1996) (stating in opinion denying

authorization to file a second §2254 petition that "[n]o petition for rehearing nor suggestion for rehearing en banc will be entertained" (citing to §2244(b)(3)(E). *See also In re King*, 190 F.3d 478, 480 (6th Cir. 1999) ("once a panel of this court grants or denies an individual permission to file a second or successive petition in the district court, §2244(b)(3)(E) prohibits any party from seeking review of the panel's decision, either from the original panel or from the en banc court."), cert. denied, ____ U.S. ____, 2000 WL 305924 (Mar. 27, 2000); *In re Sonshine*, 132 F.3d 1133, 1134 (6th Cir. 1997) (order by court of appeals denying authorization to file a second or successive §2255 motion is not appealable and may not be the subject of a petition for rehearing pursuant to §2244(b)(3)(E).; *Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997) (prohibition against petitions for rehearing of the decision by a court of appeals found in §2244(b)(3)(E) applies to §2255); *United States v. Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997) (petition for rehearing and suggestion for rehearing en banc dismissed as unauthorized under §2244(b)(3)(E).

A petition for rehearing may be filed, however, in the appeal from the transfer order itself. We conclude that the movant's argument that this court erred in determining that his first §2255 motion should not be counted as a prior motion for purposes of the gatekeeping provisions of the Antiterrorism and Effective Death Penalty Act is without merit. Accordingly the movant's petition for rehearing is denied by the panel that rendered the decision. The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF OKLAHOMA
TULSA DIVISION

JOSE RAFAEL ABELLO-SILVA,	)	
	)	
Petitioner/Defendant,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	**No. 87-CR-140-C**
	)	
Respondent/Plaintiff.	)	

PETITIONER'S MOTION PURSUANT TO FEDERAL RULES
OF CRIMINAL PROCEDURE, RULE 12(b(2) AND (f)

Now comes Jose Rafael Abello Silva with his multiple-pronged motion on jurisdiction pursuant to Rule 12(b)(2), (f), of Fed. R. Crim. P.

Petitioner's motion presents argument, supported by enumerated authorities which established irrefutable and undeniable proof that the Federal Congressional Controlled Substance Act of 1970, as set forth in Title 21 of the United State Code, is policy, not law, and is restricted to application within the jurisdictional parameters of where the federal government lawfully possesses exclusive legislative jurisdiction.

Here, petitioner was indicted on September 2, 1987, charging in Count One a conspiracy to import cocaine and marijuana in violation of Title 21 U.S.C., Section 963, and on Count Two with conspiracy to possess with intent to distribute cocaine and marijuana in violation of Title 21 U.S.C., Section 846.

In October of 1989, petitioner was extradited to the United States from Colombia, South America, to answer Counts One and Two of the above indictment.

Petitioner's trial commenced on March 29, 1990, and on May 16, 1990, the jury returned guilty verdicts with respect to both Count One and Count Two of a second superseding indictment. Petitioner was sentenced to 30 years imprisonment and fined five million U.S. dollars. Petitioner's conviction and sentence was affirmed by the Tenth Circuit Court of Appeals at 948 F.2d 1167, on December 4, 1991.

A motion for new trial pursuant to Rule 33 of Fed. R. Crim. P. was filed prior to December 4, 1993. On January 26, 1996, petitioner's motion for a new trial was denied.

Petitioner respectfully suggests that the United States District Court lacked jurisdiction from which to entertain his indictment as a matter of law pursuant to the Due Process Clause of the Fifth Amendment, let alone try the petitioner and sentence him to a term of imprisonment, so this lack of jurisdiction can only be rectified by producing petitioner in Court and mandating his immediate release from any and all penal interests.

Wherefore, petitioner prays the Court issue an Order producing him in open court and vacating the conviction for lack of jurisdiction pursuant to 84 Stat. 1262, Section 402(c)(1) and Rules 54(c) and 52(20 of Fed. R. Crim. P.

Respectfully submitted,

S/ Jose Rafael Abello Silva
06328-062, 1A1

U.S.P. Beaumont
P.O. Box 26030
Beaumont, Texas 77720-6030

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF OKLAHOMA
TULSA DIVISION

JOSE RAFAEL ABELLO-SILVA,	)	
	)	
Petitioner/Defendant,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	**No. 87-CR-140-C**
	)	
Respondent/Plaintiff.	)	

ORDER

Before the Court is defendant, Jose Abello Silva's motion attacking this Court's jurisdiction, brought pursuant to F.R.Cr.P. 12(b)(2). Abello was convicted after a jury trial in May 1990 for engaging in certain unlawful activity involving a controlled substance. The Tenth Circuit subsequently affirmed Abello's conviction and sentence in 1991. Abello's motion for new trial was denied in January 1996.

Abello argues that this Court "lacked jurisdiction from which to entertain his indictment as a matter of law." Abello contends that the Acts of Congress, which proscribe the conduct in which Abello engaged, is "locally applicable to and in force only in the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, and American Samoa." Abello asserts the Acts of Congress do not "legitimately reach the several sovereign states and population at large." Abello, in essence, argues that the federal criminal laws governing this case "do not reach persons in the State of Oklahoma, nor citizens of Columbia." He concludes that since "the federal grand jury and the federal district

court failed to have jurisdiction to indict, try and sentence petitioner, no amount of rationalization now can cure this inherently defective legislative approach." Abello's present motion is clearly meritless and must be denied.

Abello argues that Rule 12 authorizes the Court to entertain a motion contesting the district court's geographical jurisdiction at any time. Rule 12(b)(2) provides that objections to jurisdiction shall be noticed by the Court at "any time during the *pendency* of the proceedings." (emphasis added). It is clear, however, that the proceedings herein have concluded, and that they are therefore no longer pending. Abello has been convicted and sentenced, and the Circuit has affirmed. The Supreme Court denied Abello's petition for writ of certiorari in 1992. Abello-Silva v. United States, 506 U.S. 835 (1992). Abello's judgment of conviction is final. As such, Rule 12(b)(2) has no application here.

While Abello requests that the Court not construe his motion as one brought pursuant to 28 U.S.C. §2255, this is clearly the only basis permitting an attack on his conviction and sentence at this late date. See United States v. Cook, 997 F.2d 1312, 1320 (10th Cir. 1993) (jurisdictional issues are never waived and can be raised on collateral attack). However, pursuant to §2255, as amended in April 1996, Abello's motion, as construed as one brought pursuant to §2255, is time-barred. Subsequent to the 1996 amendment to §2255 imposing the one-year limitations period, the Tenth Circuit held that "prisoners whose convictions became final on or before April 24, 1996 must file their §2255 motions before April 24, 1997." United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997). It is clear from the record that Abello's conviction became final prior to April 24, 1996. A judgment of conviction is final when the judgment of conviction is rendered, the availability of appeal exhausted, and the time for petition for certiorari has expired. Allen v. Hardy, 106 S.Ct. 2878 (1986). As

noted above, the Supreme Court denied certiorari on October 5, 1992, and, at that time, Abello's conviction became final. Since Abello's present motion was filed on January 26, 1999, it is clearly time-barred under §2255.[1]

Accordingly, Abello's motion attacking this Court's jurisdiction is hereby DENIED.

IT IS SO ORDERED this 12th day of March, 1999.

S/ H. Dale Cook
Senior U.S. District Judge

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[1] Even if the Court were to consider the merits of Abello's present motion, it is clear that the motion must be denied. Abello's arguments regarding this Court's jurisdiction and the jurisdiction of the grand jury have no merit whatsoever. Abello was convicted of offenses "which fall squarely under federal jurisdiction." Cook, 997 F.2d at 1320.

APPENDIX E

2000 CJ C.A.R. 110
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA10 Rule 36.3 for rules regarding the publication and citation of unpublished opinions.)

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jose Rafael ABELLO-SILVA, Defendant-Appellant.

No. 99-5096.

Dec. 30, 1999.

Before > TACHA, > McKAY, and > MURPHY, Circuit Judges.

ORDER AND JUDGMENT > [FN*]

> FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

> MCKAY.

**1 After examining Defendant Appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See > Fed.R.App.P. 34(a)(2); 10th Cir.R. 34.1(G). The case is therefore ordered submitted without oral argument.

This is a pro se appeal from proceedings arising from a motion filed in the district court under > Rule 12(b)(2) and (f) of the Federal Rules of Civil Procedure. Defendant Jose Rafael Abello-Silva was convicted of conspiracy to import cocaine and marijuana and conspiracy to possess cocaine and marijuana with intent to distribute. He was sentenced to two concurrent terms of thirty years' imprisonment and fined $5,000,000. We affirmed his conviction and sentence in > United States v. Abello Silva, 948 F.2d 1168 (10th Cir.1991). Defendant filed for post-conviction relief, which the district court denied. This court again affirmed the district court. See > United States v. Abello Silva, 107 F.3d 22, 1997 WL 72979 (10th Cir.1997) (Table).

In the instant motion, Defendant challenged the district court's jurisdiction to entertain the indictment, arguing that Acts of Congress only apply in the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and America Samoa but not in the sovereign states of the United States and not as applied to a citizen of Columbia. The district court properly construed the motion as one brought pursuant to > 28 U.S.C. S 2255. Although the court found the S> 2255 motion time-barred under AEDPA, it also denied the motion on its merits, explaining that Defendant "was convicted of offenses 'which fall squarely under federal jurisdiction.' " R., Vol. I, Doc. 482 at 2, n. 1 (quoting > United States v. Cook, 997 F.2d 1312, 1320 (10th Cir.1993)). This appeal followed and Defendant requests a certificate of appealability from this court.> [FN1]

> FN1. The district court did not rule on Defendant's request for a certificate of appealability. Under our Emergency General Order of October 1, 1996, we deem the district court's failure to issue a certificate 1of appealability within thirty days after filing of the notice of appeal as a denial of the certificate. See > United States v. Riddick, 104 F.3d 1239, 1241 n. 2 (10th Cir.), overruled on other grounds by > United States v. Kunzman, 125 F.3d 1363, 1364 n. 2 (10th Cir.1997), cert. denied, > 523 U.S. 1053, 118 S.Ct. 1375 (1998).

After reviewing Defendant's brief, his application for a certificate of appealability, and the record on appeal, we

conclude that Defendant has failed to substantially show the denial of a constitutional right as required by > 28 U.S.C. S 2253(c)(2). His conviction became final on October 5, 1992, and he filed this motion on January 26, 1999. Not only is his motion time-barred under the AEDPA but the trial court undoubtedly possessed jurisdiction over Defendant's offenses which violated > 21 U.S.C. SS 841, > 846, > 960(b)(1)(B), (G), and > 963.

The application for a certificate of appealability is DENIED, and the appeal is DISMISSED.